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No. 90-1915

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

REX H. REED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether lists of employees' names and addresses, which the National Labor Relations Board obtains from employers and gives to unions participating in representation proceedings, are protected from disclosure to the public under Exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. 552 (b)(6).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 927 F.2d 1249. The order of the district court (Pet. 7a-9a) is not yet reported.

JURISDICTION

The opinion of the court of appeals was entered on March 15, 1991. The petition for a writ of certiorari was filed on June 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Rex H. Reed filed a request with the National Labor Relations Board under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for copies

of the "*Excelsior* lists" compiled in representation cases closed after January 1, 1984. Pet. App. 1a. An *Excelsior* list is a compilation of the names and addresses of all employees eligible to vote in a pending representation election. The Board requires employers to submit such a list in advance of an election and makes the list available to the unions participating in the election. The Board distributes *Excelsior* lists to ensure that all eligible voters have the opportunity to be informed of the issues before exercising their statutory right to vote, and to avoid challenges to voters based on the union's lack of knowledge of their identities. *Id.* at 11a; *see also Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969).

The Board's FOIA officer denied Reed's request in its entirety, concluding that *Excelsior* lists are exempt from disclosure under FOIA Exemptions 6 and 7(C), 5 U.S.C. 552(b)(6) and 7(C), "since they consist entirely of information personal to individuals—names and addresses—and since [the FOIA officer] found that [petitioner] * * * submitted no consideration which would overcome the privacy rights of the affected individuals." Pet. App. 19a. The Acting General Counsel of the Board denied Reed's appeal. *Id.* at 28a-29a.

2. Reed then filed a complaint in the district court pursuant to 5 U.S.C. 552(a)(4)(B). On cross-motions by the parties, the district court entered summary judgment for the Board based on FOIA Exemption 6, 5 U.S.C. 552(b)(6), which protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Pet. App. 7a-9a. The court found that *Excelsior* lists constitute

"similar files" within the meaning of Exemption 6; the listed employees possess a viable privacy interest in their names and addresses, even though the lists had previously been disclosed to parties in representation cases; and there is no public interest in disclosure, since the lists "themselves do not in any direct sense reveal anything about the [NLRB's] operations." *Id.* at 9a, quoting *Getman* v. *NLRB*, 450 F.2d 670, 680 (D.C. Cir. 1971).[1]

3. The court of appeals affirmed the decision of the district court. Initially, the court of appeals agreed that *Excelsior* lists are "similar files" within the meaning of Exemption 6 since they are "[g]overnment records on an individual which can be identified as applying to that individual." Pet. App. 3a, citing *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 601-602 (1982). The court of appeals also agreed that employees possess a legitimate privacy interest in their names and addresses, and that the significance of the individuals' privacy interests was not undermined by the Board's "prior disclosure of *Excelsior* lists to unions during representation proceedings and [its] failure to place restrictions on the unions' use of the lists." Pet. App. 4a. The court explained that in *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*), this Court had recognized "the privacy interest inherent in the nondisclosure of certain information

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[1] The court did not reach the Board's alternative argument that Exemption 7(C), 5 U.S.C. 552(b)(7)(C), also protects the lists from disclosure. Exemption 7(C) excludes from the disclosure requirement records compiled for law enforcement purposes, "but only to the extent that the production of such [materials] * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy."

even where the information may have been at one time public." Pet. App. 4a, quoting *Reporters Committee*, 489 U.S. at 767.

The court of appeals further concluded that *Reporters Committee* also controls the analysis of the public interest in disclosure of *Excelsior* lists, which petitioner claims outweighs the employees' privacy interests. The court noted that in *Reporters Committee* this Court had explained that only "[o]fficial information that sheds light on an agency's performance of its statutory duties" merits disclosure under FOIA, and the "disclosure of information about private citizens that is accumulated in various governmental files" would generally "reveal[] little or nothing about an agency's own conduct." Pet. App. 4a, quoting *Reporters Committee*, 489 U.S. at 773. Applying that standard, the court of appeals held that there was no public interest in the disclosure of *Excelsior* lists, since they "contain exclusively private information and would reveal nothing about the Board's conduct of representation proceedings or its performance of any other statutory duty." Pet. App. 5a. Nor, in the court's view, was a different conclusion required because Reed "plans to use the *Excelsior* lists to correct allegedly widespread misrepresentations the Board has made to employees concerning compulsory union membership and dues requirements." *Ibid.* An argument of that sort fails under *Reporters Committee*, the court of appeals stated, because the Supreme Court made clear in that case that "the identity and purpose of the requesting party are *irrelevant* under FOIA." Pet. App. 5a, citing 489 U.S. at 771.

Balancing "a viable privacy interest against a nonexistent public interest," the court of appeals

agreed with the district court that disclosure of the *Excelsior* lists would constitute a clearly unwarranted invasion of personal privacy. Pet. App. 5a. Moreover, following this Court's instruction in *Reporters Committee* that "individual circumstances [may be] disregarded when a case fits into a genus in which the balance characteristically tips in one direction," 489 U.S. at 776, the court of appeals concluded that Exemption 6 protects *Exceisior* lists as a category—not merely those lists sought by petitioner. Pet. App. 5a.[2]

ARGUMENT

1. Exemption 6 of FOIA, 5 U.S.C. 552(b)(6), protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Petitioner's basic contention is that, even if *Excelsior* lists constitute "similar files" within the meaning of Exemption 6, the courts below erred in concluding that, on balance, disclosure of *Excelsior* lists would work "a clearly unwarranted invasion of personal privacy." Petitioner does not dispute that many persons choose to limit disclosure of their home addresses in order to avoid being contacted at home, but contends that the Board has "waived" the employees' privacy interest by turning the lists over to unions without placing any restrictions on their use of the lists. Petitioner also contends that any remaining privacy interest is outweighed by his "public interest" purpose of providing employees with

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[2] Given its affirmance of the district court's Exemption 6 holding, the court of appeals found it unnecessary to remand for consideration of the Board's alternative contention that the *Excelsior* lists were also protected from disclosure under Exemption 7(C). Pet. App. 6a.

accurate information as to their rights under the NLRA. Pet. 17-21.

We believe that the courts below correctly rejected those contentions in light of the principles enunciated in this Court's decision in *Reporters Committee*. In *Reporters Committee*, the Court held that the disclosure of criminal "rap sheets" to journalists would constitute an unwarranted invasion of privacy under Exemption 7(C).[3] The Court recognized "the individual interest in avoiding disclosure of personal matters," and rejected the "cramped notion" that some public disclosure of personal information obliterates any interest in avoiding further disclosure. 489 U.S. at 762-763. The Court explained that "both the common law and literal understandings of privacy encompass the individual's control of information concerning his or her person" (*id.* at 763), and that "our cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public." *Id.* at 767, citing *Department of Air Force* v. *Rose*, 425 U.S. 352 (1976).[4]

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[3] The Court noted that the language employed to protect privacy under Exemption 7(C) differs from that found in Exemption 6, so that "the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law-enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files." 489 U.S. at 756. However, the Court recognized that the analytic framework for the evaluation of privacy invasions under both Exemption 6 and Exemption 7(C) is the same. 489 U.S. at 768-769. Petitioner agrees. Pet. 12 n.25.

[4] As noted above, the Board releases *Excelsior* lists only to unions participating in scheduled representation elections. While the Board does not put any restrictions on the partici-

In addition to making clear that individuals may retain a privacy interest in personal information that has been made public, the Court in *Reporters Committee* also reiterated that "whether disclosure of a private document * * * is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny." 489 U.S. at 772 (internal quotations omitted). Thus, while there is a public interest in the disclosure of information that directly reveals the government's conduct of its affairs, "[t]hat purpose * * * is not fostered by disclosure of information about private citizens that is accumulated in various government files but reveals little or nothing about an agency's own conduct." *Id.* at 773. Therefore, as the Court also stated, "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." *Id.* at 765. Since the lists of employee names and addresses that petitioner seeks do not, by themselves, reveal anything about the Board's conduct of its affairs, the lists are protected by Exemption 6.

2. Although the court of appeals reached the correct result in this case, it is appropriate for this Court to hold the petition while *United States Dep't of State* v. *Ray*, cert. granted, No. 90-747 (Mar. 4, 1991), is pending.

At issue in *Ray* is whether the State Department must disclose names and other information identify-

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pants' use of the lists, there is no evidence that the lists have been used by unions or other parties in a way that would defeat the privacy interests of the employees named on the lists. Indeed, if the lists "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to" them. *Reporters Committee*, 489 U.S. at 764.

ing certain Haitian citizens who consented to be interviewed by State Department personnel after they were returned from this country to Haiti, or whether such information is protected against mandatory disclosure by Exemption 6. In *Ray*, the respondent argues that even though the information he seeks has no discernible public interest in and of itself, it should be disclosed because he can use the information to locate persons who were returned to Haiti by the United States and inquire about how they were treated after they were returned. Thus, he intends to make a "derivative use" of the information to determine whether the State Department correctly determined that the persons the United States returned to Haiti had not been harassed by the Haitian government.

In our view, disclosure cannot be required on the basis of a derivative use theory. But even if it could be, disclosure would not be warranted in this case for the primary reason petitioner advances, which is that "the NLRB, on a basis that can accurately be described as pandemic, repeatedly misleads persons making inquiries of the Agency." Pet. 20. Thus, it appears that petitioner "plans to use the *Excelsior* lists to correct allegedly widespread misrepresentations the Board has made to employees concerning compulsory union membership and dues requirements." Pet. App. 5a. Such an argument is insufficient, even under a derivative use theory, because petitioner does not allege that he plans to use the lists to determine how the Board has been conducting its affairs, and it is clear that private information would be protected where it does not reveal "what the[] government is up to" (*Reporters Committee*, 489 U.S. at 773), either directly or derivatively.

However, petitioner also argues that he intends to use the *Excelsior* lists to study the Board's activities. He explains that "while the skeleton of the NLRB's defaults * * * is known," he is not entirely certain of the extent of the Board's alleged malfeasance, and must contact employees to confirm his accusations. Pet. 21; see Pet. App. 25a. That argument illustrates that it is difficult to find a logical limit to the derivative use theory, since it is possible to claim that almost any information in government files can be used to check whether the government is performing its duties properly. But since petitioner has advanced a derivative use argument similar to the argument made by the respondent in *Ray*, reconsideration of the decision below might be necessary if the Court disagrees with our submission in that case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's decision in *United States Dep't of State* v. *Ray*, No. 90-747.

Respectfully submitted.

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